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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

SAN ANTONIO CANYON MUTUAL SERVICE COMPANY,

Plaintiff, Cross-defendant and Respondent

v.

MT. BALDY RANCH, LLC,

Defendant, Cross-complainant and Appellant;

RONALD L. CURTIS et al.,

Defendants and Appellants.

E034658

(Super.Ct.No. RCV057069)

OPINION

APPEAL from the Superior Court of San Bernardino County. Ben T. Kayashima, Judge. (Retired Judge of the San Bernardino Superior Court, assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.). Affirmed.

Zakariaie & Zakariaie, Jack M. Zakariaie and Niloufar A. Zakariaie, for Defendants, Cross-complainant Appellants.

The Hudson Firm, Blake A. Hudson and Marc S. Strecker, for Plaintiff, Cross-defendant and Respondent.

Defendants and cross-complainants Ronald Curtis and Milton Prehn appeal from (1) the judgment in favor of plaintiff and cross-defendant San Antonio Canyon Mutual Service Company (plaintiff), and (2) the denial of their postjudgment motion. For the reasons set forth below, we shall affirm the judgment and denial of defendants' postjudgment motion.

FACTUAL AND PROCEDURAL HISTORY

On August 16, 2001, plaintiff filed a complaint against Mt. Baldy Ranch, LLC (Mt. Baldy), Curtis, and Prehn (collectively, defendants) for injunctive relief, interference with easement, abuse of process, trespass, and nuisance. Plaintiff alleged that it was the owner and operator of a septic system, and that defendants were interfering with the septic system. A first amended complaint was filed on August 27, 2001.

On October 12, 2001, defendants filed an answer. In addition, Mt. Baldy filed a cross-complaint for trespass, private and public nuisance, negligence, negligence per se, slander of title, declaratory relief, quiet title, injunctive relief, and ejectment. Plaintiff filed its answer to the cross-complaint on January 28, 2002.

On April 4, 2003, the parties attended a mandatory settlement conference wherein they reached a settlement. The settlement agreement stated: "The parties, including plaintiff San Antonio Canyon Mutual Service Company, defendant Ronald Curtis,

defendant Milton Prehn and defendant and cross-complainant Mt. Baldy Ranch, LLC stipulate to settle this case pursuant to the terms set forth on attachment 'A.'" On the issue of attorney fees, the parties agreed as follows:

"The parties agree to submit the issue of the amount of attorneys fees and costs [plaintiff] is entitled to, if any, to an informal, but binding, hearing before Judge Ben Kayashima or whoever he appoints on a date [and] a time, and pursuant to a briefing schedule, to be determined by the court.

"The evidence to be submitted in such a hearing will [be] limited to that evidence produced in Case # RCV057069 thru 4/4/03 including but not limited to discovery, deposition testimony which was taken (or which could have been taken)[,] exhibits listed on the exhibit lists exchanged, as well as the attorney bills and expense records and the declarations of [plaintiff] and its counsel as to the amount of fees and costs incurred and the reasonable value of the legal services provided.

"The parties stipulate that the determination of the issue of attorneys' fees and costs shall be made based on the evidence and argument presented and balancing the equities involved, notwithstanding any procedural and/or substantive impediment to the determination which may have arisen as a result of the case settling instead of proceeding through trial to judgment, including but not limited to costs of proving matters denied in response to requests for admissions, for [Code of Civil Procedure,[1] section] 128.7

[1] All statutory references are to the Code of Civil Procedure unless otherwise specified.

sanctions, for [section] 128.6 sanctions, and any and all costs and damages incurred by [plaintiff] arising from this case."

Thereafter, on May 19, 2003, plaintiff filed a motion for determination of attorney fees and costs. Defendants filed an opposition to the motion for fees. At a hearing on the motion on June 12, 2003, the trial court requested supplemental briefing and continued the hearing. On July 8, 2003, the trial court found that plaintiff was entitled to recover $98,399.12 in attorney fees and expert fees as sanctions under section 2033, subdivision (o) – $70,949.87 in attorney fees and $27,449.25 in expert fees. The court also ordered $83,190.58 in sanctions ($73,190.58 under section 2033, subdivision (o) and $10,000 under section 128.7) against Mt. Baldy, only. Judgment was entered on July 21, 2003, and a notice of entry of judgment was served on August 19, 2003.

On September 8, 2003, defendants filed a motion for (1) mistrial, (2) an order setting aside and vacating the judgment under section 473, (3) an order setting aside and vacating the judgment under section 663, and (4) a new trial under section 657. Defendants' motion was denied on October 8, 2003.

On October 23, 2003, defendants filed their notice of appeal. On November 25, 2003, we notified Curtis and Prehn that "they may not represent their co-appellant Mt. Baldy Ranch LLC before this court, "because "[n]o person may represent another, i.e., practice law on another party's behalf, unless that person is an active member of the State Bar of California. [Citations.]" On December 10, 2003, the appeal was dismissed for failure to timely designate the record on appeal. On December 22, 2003, Curtis and Prehn, and not Mt. Baldy, filed a motion for relief from default and/or dismissal of

appeal. On December 31, 2003, we granted the motion filed by Curtis and Prehn, and reinstated the appeal as to them. On April 20, 2004, Mt. Baldy filed a substitution of attorney wherein Niloufar Zakariaie of Zakariaie & Zakariaie was substituted in as counsel for all three defendants. On May 18, 2004, we filed a partial remittitur wherein the dismissal of Mt. Baldy became final. On May 28, 2004, Mt. Baldy's counsel filed a motion to recall the remittitur, to vacate order of dismissal, and to reinstate the appeal of Mt. Baldy. We denied this motion on June 17, 2004. On July 2, 2004, Mt. Baldy filed a petition for rehearing on its motion, which we denied on July 8, 2004. On July 21, 2004, Mt. Baldy filed a petition for review with the California Supreme Court. The Supreme Court denied the petition on August 25, 2004. Therefore, because Mt. Baldy is not a party to this appeal, any issues pertaining solely to Mt. Baldy will not be addressed.[2]

In the interim, we have received two requests for judicial notice: (1) on May 17, 2004, defendants filed a request for judicial notice; and (2) on June 9, 2004, plaintiff filed a request for judicial notice. We have reserved the rulings on the requests for consideration with the appeal. We hereby deny both requests for judicial notice.

ANALYSIS

I. Defendants Appealed from the Judgment

Defendants Prehn and Curtis contend that the trial court erred in imposing sanctions against defendants under section 2033; hence, granting plaintiff's motion for

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[2] Specifically, the issue regarding the section 128.7 sanctions will not be addressed because it is applicable only to Mt. Baldly.

attorney fees and costs. Plaintiff contends that we are without jurisdiction to review this issue because defendants "have not appealed from the judgment or the order awarding attorney fees and costs." We disagree with plaintiff.

A notice of appeal must be liberally construed. This general rule of construction, however, does not apply when a notice of appeal unambiguously evidences an intent to appeal from only part of a judgment, or one of several separate appealable orders or judgments. (*Unilogic, Inc. v. Burroughs Corp.* (1992) 10 Cal.App.4th 612, 624-625 (*Unilogic*); *Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46-47 (*Praszker*).) "'The rule favoring appealability in cases of ambiguity cannot apply where there is a clear intention to appeal from only part of the judgment or one of two separate appealable judgments or orders. [Citation.]'" (*Unilogic*, *supra*, 10 Cal.App.4th at p. 625, quoting *Praszker*, *supra*, 220 Cal.App.3d at p. 47.)

Here, in the notice of appeal, Prehn and Curtis stated that they were appealing from "the decisions to deny their post trial motions, as follows[:]

"1) Motion for an Order Declaring a Mistrial[;]

"2) Motion for an Order Relieving Defendants from Judgment and Order Awarding Attorneys Fees to Plaintiff and from Dismissal, Pursuant to (CCP s 473(b))[;]

"3) Motion for an Order Setting Aside and Vacating the Judgment and Setting Aside and Vacating the Order Awarding Attorneys Fees to Plaintiff and to Enter a Different Judgement and Order, Pursuant to (CCP s 663)[;]" [and]

"4) Motion for a New Trial, Pursuant to (CCP s 657)."

Thereafter, defendants stated that, "[a]dditionally, defendants and cross-complainants are *also* appealling [sic] the decision to grant plaintiff's motion for attorney fees, as decided on October 8, 2003, at the hearing on that date, after the supplemental opposition paper was filed and responded to. Additionally, defendants and cross-complainants are also appealling [sic] the judgments, all of them, against them in the above titled action."

Hence, from the notice of appeal, we discern that defendants intended to appeal from the postjudgment orders and the judgment entered in this case. Therefore, the appeal from the judgment is properly before us.

II. Defendants Waived Their Right to Challenge the Sanctions Awarded Under Section 2033

In this case, the trial court awarded plaintiff attorney fees under section 2033, subdivision (o), which provides:

"If a party fails to admit the genuineness of any document or the truth of any matter when requested to do so under this section, and if the party requesting that admission thereafter proves the genuineness of that document or the truth of that matter, the party requesting the admission may move the court for an order requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees."

On appeal, defendants contend that the trial court's order awarding sanctions was improper because (1) plaintiff never established or proved "the genuineness of the documents or the truth of the matter that was denied[,]" (2) "the admissions sought were

of no substantial importance[,]" (3) defendants "had reasonable ground[s] to believe that that party would prevail on the matter[,]" and (4) "there [were] other good reasons for the failure to admit."

Defendants, however, failed to raise these arguments in their opposition to the motion for attorney fees. "It is well established that issues or theories not properly raised or presented in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal. A party who fails to raise an issue in the trial court has therefore waived the right to do so on appeal. [Citations .]" (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 117.)

Here, defendants' opposition to the plaintiff's motion for fees was, at best, incoherent. It made no substantive arguments. From what we can decipher, defendants argued that the motion for attorney fees should be denied because the action was settled. The opposition definitely did not raise the issues raised in this appeal.

Nevertheless, Curtis and Prehn contend that their arguments were raised in the trial court because they were raised on the postjudgment motion. This contention is unavailing because the arguments should have been raised in defendants' ***opposition*** to the motion for attorney fees – not in a postjudgment motion. In fact, by this contention, defendants essentially admit that no substantive arguments were ever made in their opposition to the motion for fees.

Additionally, it appears that defendants' appellate counsel wishes us to ignore the rules of waiver because defendants, "two elderly pro per gentlemen," were not represented by counsel during these proceedings. Although we are sympathetic to

counsel's urging, we decline to ignore the rules of appellate review. Defendants were represented by counsel on and off during the course of this litigation. In fact, the trial court often advised defendants to obtain legal counsel. Nevertheless, defendants ***chose*** to proceed without counsel. They cannot now ask for leniency because of their decision to proceed without counsel during the trial court proceedings. If we allowed such trial tactics, many parties would choose to proceed through the trial courts without counsel in an effort to save money, and then if they were unsuccessful at the trial courts, they would simply hire appellate counsel to relitigate the same issues on appeal. We will not sanction such tactics. Therefore, we hold that defendants waived their right to make these arguments by failing to present them to the trial court.

III. Defendants' Due Process Rights Were Not Violated

Defendants contend that their due process rights were violated at the hearing on the motion for attorney fees. Curtis and Prehn, however, have failed to provide any legal authority to support their argument. "When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived. [Citations.]" (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785.) Therefore, this argument has been waived.

Nonetheless, even if we were to consider this argument, we find that defendants' due process rights were not violated.

At the first hearing on the motion for attorney fees, June 12, 2003, the trial court requested that the parties provide additional briefing. At this hearing, in response to a question by the trial court, Curtis indicated that he could not hear. Prehn, however, never

mentioned that he could not hear the proceedings. After discussing the time lines for additional briefing, the trial court asked if the parties waived notice. The transcript indicates that plaintiff's counsel waived notice. The transcript contains no record of a response by either Curtis or Prehn. After the proceedings, Curtis and Prehn obtained a transcript of the hearing on June 30, 2003. Based on this series of events, Curtis and Prehn argue that their due process rights were violated.

As discussed above, Curtis and Prehn failed to provide us with any legal analysis regarding their due process argument. Hence, from the briefs, we assume that they are arguing that their due process rights were violated because they were denied an opportunity to present evidence on their behalf because they were unaware about the deadline to file any supplemental briefs in opposition to the motion for attorneys fees. Defendants' argument is unavailing.

First, at the June 12 hearing on the motion for attorneys fees, only Curtis made a reference to the fact that he could not hear. Prehn never stated that he could not hear. After the hearing, defendants ordered a transcript of the hearing. Although defendants did not receive the transcript until the court-imposed deadline for supplemental briefing had passed, they received the transcript eight days before the second hearing on the attorney fees motion. Defendants had ample time to file their supplemental briefing before the hearing.

Second, even if defendants had failed to file their supplemental briefing, they still had the opportunity to present their argument and/or present a supplemental brief *at the second hearing on the attorneys fees motion* on July 8. They did neither. In fact, at the

hearing, neither Curtis nor Prehn requested that they be accommodated for any hearing impairment. Instead, they *voluntarily* chose to leave ***after*** the trial court indicated how it was going to rule on the motion. There is absolutely nothing in the record to indicate that the trial court prevented either defendant from presenting any evidence or argument to the trial court at this hearing.

Therefore, not only did defendants waive this argument by failing to support it with legal authority, their argument fails on the merits.

IV. The Trial Court Properly Denied Defendants' Postjudgment Motion

Defendants' combined postjudgment motion requested relief based on sections 657 (motion for a new trial), 663 (motion to vacate) and 473 (motion for relief), as follows:

"[T]he order granting plaintiff's motion for attorney fees be vacated, that the judgment thereupon be vacated, that the supplemental brief, (attached hereto), be filed and considered, and that a new hearing on plaintiff's motion for attorneys fees be scheduled."

The postjudgment motion was essentially a motion to reconsider the trial court's order awarding attorney fees and costs and the judgment entered thereon. "[R]egardless of [the] motion's title, to the extent it raises the same issues previously ruled upon, it is a motion for reconsideration." (*Gilberd v. AC Transit* (1995) 32 Cal.App.4th 1494, 1502.) Section 1008 is the exclusive avenue for reconsideration of prior orders, and a trial court exceeds its jurisdiction when it grants a motion to reconsider that is not based on new or different facts, circumstances, or law. (*Id*. at p. 1499; see also *Morite of California v.*

Superior Court (1993) 19 Cal.App.4th 485, 490.) As will be discussed below, defendants' postjudgment motion was, in effect, a motion for reconsideration, and the trial court properly denied that motion.

Here, the trial court first granted plaintiff's motion for attorney fees and costs. A judgment awarding the fees and costs was entered. Thereafter, defendants filed their postjudgment motion. In the postjudgment motion, defendants, in essence, asked the trial court to reconsider and vacate plaintiff's motion for attorney fees, and "that the judgment thereupon be vacated," and "that a new hearing on plaintiff's motion for attorneys fees be scheduled." No matter how defendants would like to argue that the motion sought other relief – the substance of the motion was for a reconsideration of the trial court's ruling on plaintiff's attorney fees motion. This fact is evident because, if the postjudgment motion were granted, all defendants basically wanted was an opportunity to file a "supplemental brief in opposition to plaintiff's motion for attorneys fees." This supplemental brief, however, should have been filed when the original motion for attorney fees was being considered.

In 1992 the Legislature amended section 1008 to provide that a trial court has no authority to grant a motion to reconsider if the motion fails to comply with its requirements. (Stats. 1992, ch. 460, § 4; *Gilberd v. AC Transit, supra*, 32 Cal.App.4th at p. 1499; *Morite of California v. Superior Court*, *supra*, 19 Cal.App.4th at pp. 490-491.) Subdivision (e) of section 1008 provides: "This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all

applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section."

The Legislative Counsel's Digest concerning the amendment states, in relevant part: "'(b) In enacting Section 4 of this act, it is the intent of the Legislature to clarify that no motions to reconsider any order made by a judge or a court, whether that order is interim or final, may be heard unless the motion is filed within 10 days after service of written notice of entry of the order, and unless based on new or different facts, circumstances, or law.

"'(c) In enacting Section 4 of this act, it is the further intent of the Legislature to clarify that no renewal of a previous motion, whether the order deciding the previous motion is interim or final, may be heard unless the motion is based on new or different facts, circumstances, or law.'" (Stats. 1992, ch. 460, § 1.)

Since the effective date of that amendment, rather than having the discretion to decline to hear a motion coming within section 1008, a trial court has no authority to consider or to grant such a motion unless all of the statute's requirements are met. (*Gilberd v. AC Transit, supra*, 32 Cal.App.4th at p. 1499; *Morite of California v. Superior Court, supra*, 19 Cal.App.4th at pp. 490-491.)

A motion for reconsideration or a renewal of a prior motion must be based on "new or different facts, circumstances, or law." (§ 1008, subds. (a), (b).) The motion

must include an affidavit stating "what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." (*Ibid.)* Where the motion is based on "different" facts or law, as opposed to "new" facts or law, the moving party must also provide a satisfactory explanation as to why he did not present those facts, circumstances or law in the first motion. (*Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1197-1201.) This requirement is also jurisdictional and failure to provide such an explanation bars relief. (*Ibid*.)

In this case, defendant's postjudgment motion does not include the required affidavit stating "what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown." (§ 1008, subds. (a), (b).)

Moreover, although the motion itself stated that it was supported by "this sworn affidavit of defendants," we could not find any sworn affidavit submitted with the postjudgment motion. In the motion, however, defendants stated that the purpose of their motion was to afford them an opportunity to file a supplemental brief in opposition to plaintiff's motion for attorney fees because (1) "[d]efendants were unaware of the fact that they were allowed to file a supplemental brief opposing said motion until they received the transcript of the June 12, 2003 proceeding; received on June 30, 2003 [citation][,]" and (2) "defendants could not hear the proceedings held on June 12, 2003. [Citation.]" If we were to consider these statements – even if they were not presented via a sworn affidavit – they would not have been grounds for granting a motion under section

1008.

Here, although defendants did not receive a transcript of the hearing until June 30 – that was still eight days before the hearing on the motion on July 8, 2003. Once defendants became aware of the filing of the brief, defendants could have filed a supplemental opposition during this time period. Defendants did not. Moreover, at the hearing where the trial court ordered that additional briefing be submitted, we note that defendants *never* requested that they be accommodated for their hearing impediment. Furthermore, at the continued hearing on the motion for attorney fees, defendants could have raised the same argument that they sought to file via their postjudgment motion. They did not. Again, defendants did not request any accommodation for their alleged hearing impediment. Instead, defendant Curtis simply stated, "With all due respect, Your Honor, I can't hear a word you're saying. *We're out of here.*" The court responded, "It's up to you." Thereafter, it appears that defendants simply left the proceedings – instead of trying to participate by requesting hearing aids and explaining their position.

Hence, because the facts stated in the supplemental opposition to plaintiff's motion for fees were either facts or legal authority known, or that should have been known, to defendants when the hearing on the motion was heard, there was simply no "new or different facts, circumstances, or law" (§ 1008, subds. (a), (b).) that would have warranted the granting of defendant's postjudgment motion under section 1008. (See *Baldwin v. Home Savings of America*, *supra*, 59 Cal.App.4th at pp. 1197-1201.)

Additionally, we note that the trial court lacked jurisdiction to vacate its prior

order granting plaintiff's motion for fees and judgment thereon because the postjudgment motion was not timely filed. Under section 1008, subdivision (a), a motion for reconsideration must be filed "within 10 days after service upon the party of written notice of entry of the order." In this case, the notice of entry of judgment was served on August 19, 2003. The postjudgment motion, however, was not filed until September 8, 2003. Therefore, the motion was untimely.

A. The Court Had No Authority to Grant Defendant's Postjudgment Motion under Sections 657 and 663

Even if the postjudgment motion was not considered to be a disguised motion for reconsideration, it would still be untimely under sections 663 and 647.

Motions under sections 663 and 657 must be filed within 15 days after notice of entry of judgment is served. Neither of these deadlines is extended by section 1013 for mailing of the notice of entry of judgment. (See, sections 663a and 657.) The time limits under sections 663 and 657 are jurisdictional. (See *Advanced Building Maintenance v. State Compensation Ins. Fund* (1996) 49 Cal.App.4th 1388, 1393-1394 and *In re Marriage of Beilock* (1978) 81 Cal.App.3d 713, 721.) However, in this case, defendants filed their postjudgment motion 20 days after the notice of entry of judgment was served. Because the 15-day deadline is not extended by section 1013, the postjudgment motion under sections 663 and 657 was filed untimely. Therefore, the court had no authority to grant the postjudgment motion based on sections 663 and 657.

B. The Trial Court's Order Denying Defendants' Motion to Vacate the Judgment Under Section 473 Is Not Appealable

Moreover, even if we were to consider defendants' postjudgment motion as a motion under section 473, defendants are barred from appealing the ruling on that motion.

Generally, an order made after judgment is appealable under section 904.1, subdivision (a)(2). However, an order denying a motion to vacate a judgment, in general, is not appealable. (*Martin v. Johnson* (1979) 88 Cal.App.3d 595, 603.) The purpose of this rule is to prevent the losing party from having "the right to one appeal which the law expressly gives, and the time of which it limits, which appeal must be a direct appeal from the order or judgment, and likewise another appeal from an order of the court, made at some indefinite future time refusing a motion to vacate the judgment." (*Estate of Baker* (1915) 170 Cal. 578, 582.) This is true where an appeal of the order declining to vacate would involve no issues or facts other than those that could have been addressed by appeal from the judgment itself. (*Forman v. Knapp Press* (1985) 173 Cal.App.3d 200, 203.)

Additionally, the purpose of section 473 is to relieve parties from various kinds of defaults, or proceedings in the nature of defaults. (*In re Marriage of Hock & Gordon-Hock* (2000) 80 Cal.App.4th 1438, 1443-1444.) "[S]ection 473 does not apply where the party has had an opportunity to have her or his day in court and has contested the judgment or order." (*Id*. at p. 1444.) Thus, section 473 may not be used as a means of

relitigating matters based on evidence that was not presented in a previously contested proceeding.

One exception to this general rule is where the moving party lacked an effective, meaningful opportunity to appeal from the judgment itself, as by fraud or extrinsic mistake. (*Daley v. County of Butte* (1964) 227 Cal.App.2d 380, 388-389 (*Daley*).) This exception does not apply to defendants. As discussed above, defendants in fact did file an appeal from the judgment itself.

Another exception to the general rule is when "the underlying judgment is void. In such a case, the order denying the motion to vacate is itself void and appealable because it gives effect to a void judgment." (*Carlson v. Eassa* (1997) 54 Cal.App.4th 684, 691.) There is nothing in the record to indicate, and defendants do not argue that the judgment in this case is void.

Therefore, the order denying defendants' motion to vacate the judgment is not appealable.

DISPOSITION

The trial court's denial of defendant's postjudgment motion and judgment are affirmed. Plaintiff and respondent San Antonio Canyon Mutual Service Company shall recover its costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ Ward
J.

We concur:

/s/ Hollenhorst
Acting P. J.

/s/ King
J.